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## CORPORATE LAW DEVELOPMENTS AND REFORM

### QUESTIONS AND ANSWERS

#### Question – Tom Bostock (Mallesons Stephen Jaques, Melbourne):

I would just like to quickly probe the views of the panel a little further on that third element of the standard of care – the experience element. It seems that there is a bit of a dilemma here because on the one hand as Betty McNee has pointed out, it puts a premium on lack of experience – to a degree, and on the other hand, bearing in mind that company directors are not like lawyers or doctors who have been trained to a certain level of skill, they are an infinitely varied lot. What solution to that dilemma do the speakers see?

#### Response – Frank Macindoe (Speaker):

One thing I would say, the existing case law does specify (was it *Commonwealth Bank of Australia v Friedrich* which said it?) that if you cannot read a balance sheet, you should not be a director. So probably the answer is that all directors do have to have a reasonable level of ability, and if they do not, they risk facing the consequences.

#### Response – Betty McNee (Speaker):

That is also my conclusion and it may not be as extreme as I have drawn it – I have done that quite deliberately. But my concern is simply that from observation there will be some directors who really will not know what question it is they have to ask. And that is not an issue of being able to read financial statements. If you look at skills set across say a public board, you are going to have some lawyers, you will have some financial people, you will have maybe some economists and some special skills, but you will not have small business people. And in an area as sophisticated as banking – for instance, if you look at some of the derivative products that banks are getting involved in – it would be beyond the wit of most of us, I suggest, maybe even Bob, to understand what questions needed to be asked about a particular high risk derivative product. So, I am sorry, I do not have the answer Tom. I would just flag it as something, I think, for a fair bit of case law on.

#### Response – Robert Baxt (Speaker):

Well, you are quite right. I would not have the answer about the derivatives and I would hate to be found to be in breach of my duty of care if I was a director in that particular context. Perhaps I should not go on to the board of a company that might be toying with that idea, but that would be quite ridiculous because you would preclude many able people from sitting on boards which wanted to be a bit adventurous. I feel that they have gone too far and certainly the Institute of Company Directors, I should indicate, has actually suggested that that be dropped and that the standard be returned to the standard that we have under the current law. But just bear in mind this thought in terms of the way the law goes. If that particular set of reforms was to be put into place, we may then have a series of cases which go to the other extreme. In a separate paper

that I wrote a year ago I talked about the way the law develops in this area and the way the courts look at such laws as the swing and the pendulum – it is a bit like the way they used to look at section 260 of the Income Tax Assessment Act – you used to get one extreme and then another extreme. But just imagine a series of very bad company collapses, no ability to sue directors because of the very lax standards of care, the Labor Party gets back into power, Gareth Evans becomes Attorney-General for the second time – he proposed some years ago that we actually have in the companies legislation a set of actual prescriptive rules of what directors had to achieve to become directors. God help us if that ever happens!